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In the Supreme Court of the United States

OCTOBER TERM, 1994

NISQUALLY INDIAN TRIBE, PETITIONER

v.

CULLEN AND CULLEN, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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64 pp

QUESTION PRESENTED

Whether attorneys engaged in federal practice under a dual-proceeding contingency fee contract must, prior to perfecting an attorney lien in federal district court, fulfill their fiduciary duties of full disclosure to their client in fixing their fees based on values of structured settlements calculated by the adverse parties.

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v.

CULLEN AND CULLEN, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Nisqually Indian Tribe petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum decision of the United States Court of Appeals for the Ninth Circuit (App., *infra*, 1a) is unreported. The judgment of the United States District Court for the Western District of Washington (App., *infra*, 22a) and the orders of the district court (App., *infra*, 7a, 16a & 20a) are unreported.

SUPREME COURT JURISDICTION

The memorandum decision of the United States Court of Appeals for the Ninth Circuit was entered on February 25, 1994.

The Ninth Circuit's order denying the Tribe's petition for rehearing with suggestion for rehearing en banc was entered April 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, ETC. INVOLVED

16 U.S.C. § 797

The Commission is authorized and empowered -

* * * * *

(e) Issue of licenses for construction, etc., of dams, conduits, reservoirs, etc.

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided,* That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary

of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

16 U.S.C. § 808

§ 808. New licenses and renewals; compensation of old licensee; licenses for nonpower use; record-keeping

(a) If the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 807 of this title, the commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do in the manner specified in section 807 of this title: *Provided,* That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

25 U.S.C. § 81

§ 81. Contracts with Indian tribes or Indians

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupations; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of

value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

(R.S. § 2103; Pub. L. 85-770, Aug. 27, 1958, 72 Stat. 927.)

25 U.S.C. § 82

§ 82. Payments under contracts; aiding in making prohibited contracts

No money shall be paid to any agent or attorney by an officer of the United States under any such contract or agreement, other than the fees due him for services rendered thereunder; but the moneys due the tribe, Indian, or Indians, as the case may be, shall be paid by the United States, through its own officers or agents, to the party or parties entitled thereto; and no money or thing shall be paid to any person for services under such contract or agreement, until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract.
(R.S. § 2104.)

25 U.S.C. § 476

§ 476. Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

(a) Adoption; effective date

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when-

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

(b) Revocation

Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings

(1) The Secretary shall call and hold an election as required by subsection (a) of this section-

(A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or

(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall-

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and

(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) Approval or disapproval by Secretary; enforcement

(1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

(e) Vested rights and powers; advisement of presubmitted budget estimates

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.
(June 18, 1934, ch. 576, § 16, 48 Stat. 987; Nov. 1, 1988, Pub. L. 100-581, title I, § 101, 102 Stat. 2938.)

Revised Code of Washington

Chapter 60.40

Lien for Attorney's Fees

RCW § 60.40.010 Lien Created. An attorney has a lien for his compensation, whether specially agreed upon or implied, as hereinafter provided: (1) Upon the papers of his client, which have come into his possession in the course of his professional employment; (2) upon money in his hands belonging to his client; (3) upon money in the hands of the adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party; (4) upon a judgment to the extent of the value of any services performed by him in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and any entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice. [Code 1881 § 3286; 1863 p 406 § 12; RRS § 136.]

RCW § 60.40.020 Proceedings to compel delivery of money or papers. When an attorney refuses to deliver over money or papers, to a person from or for, whom he has received them in the course of professional employment, whether in an action or not, he may be required by an order of the court in which an action, if any, was prosecuted, or if no action was prosecuted, then by order of any judge of a court of record, to do so within a specified time, or show cause why he should not be punished for a contempt. [Code 1881 § 3287; 1863 p 406 § 13; RRS § 137.]

RCW § 60.40.030 Procedure when lien is claimed. If, however, the attorney claim a lien, upon the money or papers, under the provisions of *this chapter, the court or judge may: (1) Impose as a condition of making the order, that the client give security in a form and amount to be directed, to satisfy the lien, when determined in an action; (2) summarily to inquire into the facts on which the claim of a lien is founded, and determine the same; or (3) to refer it, and upon the report, determine the same as in other cases. [Code 1881 § 3288; 1863 p 406 § 14; RRS § 138.]

***Reviser's note:** "this chapter" appeared in section 3288, chapter 250 of the Code of 1881, the lien sections of which are codified as chapter 60.40 RCW.

NISQUALLY ORDINANCE NO. 1989-1

CHAPTER XI

ATTORNEYS FEES

Sec. 1. The TCL Agreement resolves litigation between the Nisqually Indian Tribe and the City of Tacoma and obligates the Nisqually Indian Tribe under paragraph VIII of the Special Counsel Contract dated June 4, 1981, to payment of attorneys' fees and costs. A percentage of the annual unrestricted funds, that percentage to be negotiated with the Business Committee, will be used to pay these fees and costs.

WASHINGTON RULES OF PROFESSIONAL CONDUCT (1988 edition)

RULE 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.5 FEES

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by section (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcom eof the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

RULE 1.7 CONFLICT OF INTEREST; GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) Each client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure).

WASHINGTON RULES OF PROFESSIONAL CONDUCT (1992 edition)

RULE 1.5 FEES

(c) A fee may be contingetn on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by section (d) or other law.

(1) A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(2) A contingent fee consisting of a percentage of the monetary amount recovered for a claimant, in which all or part of the recovery is to be paid in the future, shall be paid only (i) by applying the percentage to the amounts recovered as they are received by the client or (ii) by applying the percentage to the actual cost of the settlement or award to the defendant.

RULE 1.14 PRESERVING IDENTITY OF FUNDS AND PROPERTY OF A CLIENT

(a) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable interest-bearing trust accounts maintained as set forth in section (c), and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein;

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

STATEMENT OF THE CASE

The material facts are undisputed. The law firm of Cullen & Cullen ("firm") entered into a ten-year contingency fee contract with the Nisqually Indian Tribe ("Tribe") in 1979 to represent the Tribe in on-going, dual proceedings. CR[1] 232 at 3-4. The firm was to pursue damage claims in federal district court against the Cities of Tacoma and Centralia, Washington. The Tribe claimed damages for losses to the anadromous fishery resources reserved by the Tribe under the Treaty of Medicine Creek of 1854 (10 Stat. 1132) as a result of the cities' operation of hydroelectric facilities on the Nisqually River. The basis for federal court jurisdiction in that underlying litigation was 28 U.S.C. §§ 1331 and 1362.

The firm also was to represent the Tribe in the cities' on-going hydroelectric licensing and relicensing proceedings before the Federal Energy Regulatory Commission (FERC). The contract's contingency fee rate was to be based on a scale tied to the amount of recovery, with a maximum fee of $1.375 million. CR 284, Exh. 45, ¶ VIII at 336.

As required by federal law, 25 U.S.C. §§ 81 and 476(e), *see* Statutes Involved, *supra*, 6-7 & 11 respectively, the firm transmitted its proposed contract to the United States Bureau of Indian Affairs (BIA) for approval. By letter to the Tribe, the BIA disapproved the contract in part because it believed the contract language would have allowed the attorneys' contingency fee to apply to fishery mitigation measures ordered by the FERC. CR 284, Exh. 44 at 320-22. The BIA's disapproval also was in part because the BIA wanted the contract modified to state that contingency fee calculations were to be applied after the deduction of costs, i.e., fees were to be based on net and not gross recovery. The BIA's disapproval letter was archived in Tribal files and was not again uncovered until discovery in this lien proceeding in the Fall of 1991.

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[1] "CR" refers to the Clerk's Record as developed in the district court.

The attorneys modified the contract and sent it to the BIA with a letter explaining that the modifications were intended to satisfy the BIA's concerns. CR 284, Exh. 45 at 323-24. The BIA approved the amended contract in 1980. CR 284, Exh. 45 at 328-39. The attorneys' transmittal letter was never disclosed to the Tribe, but was uncovered by the Tribe in BIA records during discovery in this lien proceeding. The attorneys did not remind the Tribe of these contract requirements when it claimed its fees ten years later.

Less than one year after BIA approval of the 1979 contract, the attorneys asked for a contract modification that would increase their maximum fees to $2 million. CR 284, Exh. 48. A new ten-year contract was signed in 1981 with the increased fees and the same terms as the 1979 contract. CR 284, Exh. 2. The BIA disapproved the contract.

In 1987 a structured settlement was negotiated with the City of Tacoma. CR 230 at 6. At the time of the negotiations, Kevin Lyon and Susan Hvalsoe of the firm were also representing the Tribe in its efforts to finance construction of a bingo facility. CR 287 at ¶ 4; CR 235 at 33. Unbeknownst to the Tribe, simultaneously the two lawyers also secretly were representing an individual Tribal member, Bill Frank, Jr., in his efforts to finance construction of what was to be a competing bingo facility on the Nisqually Reservation. CR 284, Exh. 47 at 375. Mr. Frank was a Tribal negotiator for the settlement negotiations with both cities and was later a party to the discussions on the attorney fee agreement at issue here. CR 289, ¶ 10 at 4.

In the settlement, Tacoma agreed to pay the Tribe five annual payments of $250,000. In exchange, the Tribe agreed to perform Tacoma's mitigation efforts through operation and maintenance of a federal fish hatchery to be located along the Nisqually River. The Tribe also agreed to acquire land for the federal hatchery, construction of which was to be funded by Congress. Tacoma was to submit its annual payments to the Tribe for the Tribe's assumed costs of operation and maintenance of the federal hatchery. The operations funding was made contingent upon the FERC's relicensing of the city's

hydroelectric facility under § 15(a) of the Federal Power Act *(see* Statutes Involved, *supra,* 5), provided the terms of the license reflect the terms of the settlement. CR 211.

Engineers for Tacoma calculated the value of the settlement with the participation of the two lawyers and the Tribal negotiating team, including the lawyers' undisclosed client, Mr. Frank. The city's value was $15.6 million, which included the five annual payments to the Tribe of $250,000 and the contract funding for the federal fish hatchery. CR 235 at 9-10. The lawyers did not advise the Tribe that the firm intended to use the city's values for purposes of calculating attorney fees. Nor did the lawyers advise the Tribe that Tacoma's values did not necessarily reflect actual present values of the Tribe's recovery, or that the Tribe should seek independent valuations from a disinterested expert. Nor did the lawyers advise the Tribal negotiators of the firm's contract amendments to prohibit the application of contingency fees to mitigation measures.

The members of the governing body of the Tribe, its Business Committee, who were involved in, and familiar with, the settlement negotiations with Tacoma, left office and were replaced by new members in January of 1989. CR 294, Reuben Wells Dep. at 4. In May of 1989, the Tribe adopted an ordinance to implement to settlement agreement. The firm drafted a chapter of the ordinance that required that only damage payments from Tacoma---identified as "unrestricted funds"---could be used to pay attorney fees. Statutes Involved, *supra*, 14. In September of 1989, the Tacoma settlement was filed in the federal district court proceedings and by stipulation of the parties the court dismissed Tacoma as a party. CR 211.

The Business Committee asked its newly-hired staff attorney to summarize the contingency-fee section of the firm's twelve-page 1981 contract, which was done by memo. CR 284, Exh. 57. The staff attorney then advised the Business Committee that he learned the 1981 contract was never approved by the BIA. The firm orchestrated the resubmission of the contract by the Tribe and the contract was approved in August of 1990. CR 289, ¶ 9.

The firm accepted Tacoma's first payment of funding for the federal fish hatchery and upon receipt of Tacoma's first installment of damage payments, on October 25, 1989, the firm filed two liens under Washington's lien statutes (*see* Statutes Involved, *supra*, 12-13) on both damage and mitigation funds in federal district court claiming $1.78 million in fees plus costs. CR 212 & 213;

In November the Tribe authorized the payment of about $67,000 to satisfy one of the liens for costs. CR 235, 11. On January 26, 1990 four members of the seven-member Business Committee and three Tribal members, including Mr. Frank, met with the attorneys at their Olympia law office to discuss the second lien on the contract funds. One member of the Business Committee present had a seventh-grade education level. CR 294, Reuben Wells Dep., 15. The lawyers convinced the Business Committee that its predecessor members bound the Tribe to accept the value figure prepared by Tacoma's engineer for purposes of calculating attorney fees. CR 289, ¶ 11; CR 286, ¶ 4; CR 288, ¶ 4. The firm's lawyers drafted a resolution based on Tacoma's values and the Business Committee passed the measure at the firm's office. CR 284, Exh. 6.

A similar settlement with the City of Centralia was then negotiated with members of the Business Committee, Tribal biologists, the lawyers and Mr. Frank. CR 284, Exh. 15. Centralia's economist prepared a computer program for calculating values of the settlement payments, and the Tribe's biologist input the figures on the computer to determine a value of the combined damage and mitigation payments. CR 306, ¶¶ 2-3. The figure produced was $10.6 million. Upon dismissal of Centralia in the federal court action, the firm claimed from the Tribe fees and costs based on the $10.6 million figure, claiming entitlement to the remaining $220,000 of the $2 million maximum fees. CR 284, Exh. 15. At that point for the first time the Tribe sought independent legal and economic advice.

The Tribe asked the firm to explain how its fees were calculated. The firm refused and responded: "We invite you to do your own calculation and determine if it is different from what came out of the settlement negotiations." CR 284, Exh. 20

at 230. The firm then filed another lien, closed the trust accounts and sent the Tribe the remainder of what was not claimed. CR 284, Exh. 21. The lawyers threatened that if the Tribe challenged the firm's claim for fees, the firm would countersue for additional fees and seek sanctions for frivolous claims. The firm also refused to submit the fee matter to the state bar's fee arbitration services. The Tribe warned the firm that it had violated state rules of professional conduct by closing the account after filing its lien and the Tribe insisted the trust funds be preserved, whereupon the firm stated it would do so only if the Tribe proved its case to the satisfaction of the firm. CR 284, Exh. 7.

On May 3, 1991 the Tribe filed a motion to quash the lien on grounds that: 1) the fees were improperly calculated; 2) the $625,000 increase in fees was unsupported by new consideration; 3) the firm could not assert a claim for costs of a third-party lawyer long out of the case, and 4) that the attorneys engaged in a pattern and practice of ethical misconduct, which conduct should foreclose their ability to invoke the equitable lien protection of the federal court. In support of the Tribe's motion to quash, the Tribe filed an affidavit of an independent economist showing that actual present value of the combined settlements for fee-fixing purposes should have been approximately $5.346 million rather than the $26.2 million as claimed by the firm. CR 224. The Tribe then sought review of the fees by the BIA, whereupon the firm convinced the BIA to stay its hand pending disposition of the lien proceeding. CR 284, Exh. 61. Following discovery the parties filed cross-motions for summary judgment. The firm filed affidavits of its economist in which the economist claimed the actual present value of both the damage payments and the mitigation payments to be somewhere between $16 and $21 million.

The district court denied the Tribe's motion and granted the firm's holding that: 1) the attorneys had no duty of full disclosure in fixing their fees, 2) the Tribe's resolution foreclosed the Tribe's ability to challenge the firm's fees, 3) the court was unpersuaded that the cities' values were improper, 4) there was new consideration supporting the fee increase, 5) the

firm had standing to assert a claim for third-party costs, 6) the successful settlement in the underlying litigation cured the firm's documented misconduct, and 7) the firm was entitled to post-judgment interest at the statutory rate of 12 percent. App., *infra*, 7a, 16a, 22a.

The Tribe appealed to the Ninth Circuit Court of Appeals the issues of whether: 1) the Tribe waived the attorneys' nondisclosure, 2) ethical misconduct precludes equitable lien protection, 3) the firm was entitled to third-party costs, and 4) the Tribe had waived sovereign immunity as to post-judgment interest. The Ninth Circuit affirmed as to the first three issues but reversed as to post-judgment interest. App., *infra*, 1a. The Tribe's petition for rehearing with suggestion for rehearing en banc was denied (App., *infra*, 25a), and on April 28, 1994, the Tribe's motion for stay pending this application was granted. App., *infra*, 27a.

REASONS FOR GRANTING THE WRIT

LAWYERS ENGAGED IN FEDERAL PRACTICE MUST BE HELD, AS A MATTER OF FEDERAL COMMON LAW INFORMED BY APPLICABLE STATE LAW AND FEDERAL STATUTES, TO STRICT FIDUCIARY STANDARDS TO PROVE THAT THEY MADE FULL DISCLOSURE IN FIXING THEIR FEES BASED ON ACTUAL PRESENT VALUES OF STRUCTURED SETTLEMENTS

The District Court held the attorneys here had no duties of full disclosure in the calculation of their fees. App., *infra*, 12a-13a. The Ninth Circuit avoided the duty question entirely and held that the Tribe had "admitted" the firm's values were correct, though there was no disclosure made to, or independent knowledge obtained by, the client. App., *infra*, 3a. Supreme Court review is necessary to clarify that attorneys may not avoid their fiduciary duties of full disclosure merely by engaging in federal practice.

The proper method of analysis for fee-fixing cases in federal courts should be, first, to determine the extent of the disclosure duty commensurate with the complexity of the structured settlements and the relative sophistication of the parties. Secondly, the court should address the actual present values in light of applicable federal common law. Thirdly, the court should determine whether the attorneys satisfied their burden of proving that they made full disclosure based on the surrounding circumstances and applicable law. And finally, if the attorneys breached their disclosure duties, the court must determine whether the client waived or ratified the breach with full knowledge of material facts and applicable law. The lower courts failed to apply a logical method of analysis in this case and, accordingly, ignored the fundamental principles of federal law as announced by this Court.

This Court unanimously recognized in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), that federal courts have the inherent authority to police the conduct of attorneys as a matter of federal common law; *see also, Nat. Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 850, 85 S.Ct. 2447, 2450-51, 85 L.Ed.2d 818 (1985)(questions of federal common law are claims "arising under" federal law for purposes of Section 1331 of the Judicial Code). Recently, this Court granted a petition for writ of certiorari in the case of *O'Melveny v. F.D.I.C.*, 114 S.Ct. 543, 126 L.Ed.2d 445, 62 USLW 3368 (Nov. 29, 1993)(No. 93-489). The Ninth Circuit had held that attorneys owe the public a fiduciary duty under federal common law, in rendering opinions related to securities, to conduct an independent inquiry on facts presented them by their clients. *F.D.I.C. v. O'Melveny*, 969 F.2d 744 (9th Cir. 1992).

The Tribe in this case does not seek an extension of attorney disclosure duties to the public, though significant public interests are implicated here.[2] In this case the Tribe seeks a

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[2] The trust funds at issue are derived from public utility ratepayers and are to be applied in large part to operate and

federal common law rule that fiduciary duties of full disclosure are necessary to protect clients directly in the attorney-client relationship. The extent and nature of those duties depend on the facts of each case and the applicable statutory, common law and ethical rules of the state. But there must be a threshold federal rule of full disclosure, as this case illustrates, given the complex nature of these settlements, the self-interests of the lawyers and its undisclosed client, and the attorney contract modifications as required by the Federal Government.

Washington common law, for example, has established well-settled duties of full disclosure that should have been applied by the courts below as a matter of federal common law. *E.g.*, *Allard v. Pacific Nat'l Bank*, 99 Wash.2d 394, 663 P.2d 104 (1983)(holding it is a breach of fiduciary duty not to obtain an independent, outside property appraisal to determine its fair market value for a client); *Perez v. Pappas*, 98 Wash.2d 835, 659 P.2d 475 (1983)(holding it is a breach of fiduciary duty not to make full disclosure or full accounting when setting attorney fees); *Liebergesell v. Evans*, 93 Wash.2d 881, 613 P.2d 1170, 1177 (1980)(holding that the nature of the transaction can give rise to a duty of full disclosure that includes the duty not to passively acquiesce in the self-deception of the other party); *Esmieu v. Schrag*, 88 Wash.2d 490, 498, 563 P.2d 203 (1977)(holding that it is a fiduciary duty of a trustee to inform the beneficiaries fully of all facts which would aid them in protecting their interests); *Kane v. Klos*, 50 Wash.2d 778, 314 P.2d 672 (1957)(holding that a corporate board's passage of a resolution without full disclosure by the corporate officer requesting the measure could not be construed as ratification of the officer's breach without the board's full knowledge of the

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maintain federal hatchery programs for production of anadromous fish. Surviving fish will be available for public harvest in Washington's Puget Sound and the Pacific Ocean along the coasts of Alaska, Canada and Washington. Similarly, the standard of conduct for lawyers in federal practice affects the public interest generally.

material facts and their legal effect); *Ward v. Richards & Rossano, Inc.*, 51 Wash. App. 423, 754 P.2d 120 (1988)(review denied)(holding that fee-fixing during the attorney-client relationship imposes on the attorney the duty to prove the contract was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the material facts and law); *see United States v. Bennett*, 57 F. Supp. 670 (E.D. Wash. 1944)(same as *Kane v. Klos, supra*); *see also Eriks v. Denver*, 118 Wash.2d 451, 824 P.2d 1207 (1992)(holding that an attorney's representation of undisclosed clients with conflicting interests is a violation of the rules of professional conduct as a matter of law and disgorgement of all attorney fees is an appropriate remedy); *Ross v. Scannell*, 97 Wash.2d 598, 647 P.2d 1004 (1982)(holding that attorney misconduct, including economic coercion, may be grounds for denying attorney fees); *cf. Browning v. Johnson*, 70 Wash.2d 145, 422 P.2d 314, *revised*, 70 Wash.2d 646, 430 P.2d 591 (1967)(holding that parties are bound to a renegotiated agreement when they were equally informed, of equal bargaining power and equally assisted by able counsel).

Washington's Rules of Professional Conduct (WRPC) also impose strict rules of disclosure on attorneys. *See* Statutes Involved, WRPC 1.4 (a lawyer must communicate with the client and promptly comply with requests for information); WRPC 1.5(c)(upon conclusion of a contingency fee matter, a lawyer must account for the method of fee calculation)[3], and WRPC 1.7(a)(a lawyer must fully disclose material facts related to reasonable conflicts with other clients), *supra*, 15-18.

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[3] Due to overreaching by attorneys in valuing structured settlements in contingency fee matters, see *Allard v. First Interstate Bank of Washington*, 112 Wash.2d 145, 768 P.2d 998, 1002-1004 (1989)(Dore, J. dissenting), Washington now prohibits the calculation of actual present values as a method for determining contingency fees. Statutes Involved, WRPC 1.5(c)(2)(effective Sept. 1, 1990; suspended Sept. 18, 1990; suspension lifted Dec. 12, 1990), *supra*, --.

Here the lawyers allowed the adverse parties to control the economic assumptions applied to calculate the values of the settlements. The lawyers undertook no independent calculation, even when asked directly by the client to explain the basis for the firm's fee calculations. These and the other blatant breaches of fiduciary duties by self-interested lawyers went unaddressed by the courts below. This case cries out for this Court's supervision.

In addition to federal common law as informed by state law, this Court long ago recognized that Congress intended by enactment of statutes requiring federal review of attorney contracts and fees,[4] "to protect the Indians from improvident and unconscionable contracts." *In re Sanborn*, 148 U.S. 222, 13 S.Ct. 577, 579, 37 L.Ed. 429 (1893). Those statutes are meaningless without a concomitant obligation on the part of lawyers to make full disclosures both to their clients and to the Federal Government. Here the lawyers never disclosed to the Tribe or the Federal Government the basis for their fee calculations.[5] The lower courts failed to address the need for full disclosure to effectuate these statutes.

FEDERAL COMMON LAW ESTABLISHES ECONOMIC PRINCIPLES GOVERNING ACTUAL PRESENT VALUE CALCULATIONS THAT WERE IGNORED BY THE COURTS BELOW

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[4] Now codified at 25 U.S.C. §§ 81, 82 and 476. See Statutes Involved, *supra*, 6-11.

[5] The certification of the Tribe's resolution setting the fees also was falsified by the firm to shield from BIA oversight---had it been submitted to the BIA---the facts that the measure was passed at a special meeting held at the firm's offices, and not at a regular meeting held on the Reservation as stated. CR 284, Exh. 6 at 143.

The Tribe urged the district court and the Ninth Circuit to consider the firm's valuation claims in light of this Court's unanimous decision in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983). But both courts ignored the complex economic analyses that must be applied in actual present value calculations as required by *Jones*. Had either court examined the cost/benefit analysis set forth in Justice Stevens' opinion in *Jones*, 462 U.S. at 534, the extent of the attorneys' duty to disclose would have become more clear. Moreover, the concern of the BIA that mitigation funding not form the basis for contingency fee calculations makes economic sense in light of *Jones*.

Jones reaffirmed the long-standing federal rule, as first announced in *Chesapeake & Ohio Railroad v. Kelly*, 241 U.S. 485, 491, 36 S.Ct. 630, 631-32, 60 L.Ed. 1117 (1916), that the proper measure of damages is inseparably connected with the right of action. Accordingly, damages in a federal cause of action are determined by federal law. This Court reaffirmed recently that as a matter of federal common law, the value of payments to be received over time must be reduced to actual present value. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988); *id.*, 108 S.Ct. at 1846 (Blackmun, J. joined by Marshall, J. dissenting); *id.*, 108 S.Ct. at 1850 (O'Connor, J. joined by Rehnquist, C.J. dissenting).

Jones noted that courts disagree on how applicable discount rates are to be calculated and that no federal rule of decision will be imposed because of shifting economic influences. 462 U.S. at 541. Similarly, Washington common law leaves determination of the appropriate discount rates to the economists. *Perez v. Pappas, supra*, 659 P.2d at 483. The parties' economists in this proceeding agreed on the appropriate discount rates to be applied to these settlements. CR 309 at ¶ 5. The economists disagreed, however, as to whether a cost/benefit analysis should be employed. CR 309 at 2, ¶ 2. But there is no disagreement under federal common law on whether "costs should also be deducted" before discount rates are to be applied.

Jones, 462 U.S. at 534. The Tribe's economist, therefore, properly deducted from his settlement calculations the obligations the Tribe assumed to expend as costs the operations and maintenance funding provided by the cities for fishery mitigation projects. The firm's economist did not because he falsely assumed that the Tribe had some unarticulated, pre-existing obligation to perform the cities' mitigation efforts under §§ 4(e) and 15(a) of the Federal Power Act. *See* Statutes Involved, *supra*, 3-5.

The municipalities agreed in their settlements with the Tribe that the mitigation funding was to cover costs. CR 284, Exh. 2 at 81-82 (Tacoma agreement); CR 284, Exh. 15 at 208-09 (Centralia agreement). Thus, the Tribe's economic analysis conforms not only with the *Jones* requirement that costs be deducted, but also with the agreement of the parties to the settlement agreements. The courts below failed to address *Jones* and the agreement of the parties to treat contract funding as costs.

The economic analyses required for these complex settlements illustrate why the firm's lawyers had fiduciary duties to make full disclosure to the Tribe. They should have insisted on independent calculations performed by qualified economists. They should have advised the Tribe of the common law dictates of *Jones* and state procedural and evidentiary law governing structured settlement valuations. And they were ethically obligated to provide an accounting to the Tribe on how the fees were calculated. *See* Statutes Involved, WRPC 1.5(c), *supra*, 17.

RATIFICATION OR WAIVER OF THE ATTORNEYS' BREACH OF FIDUCIARY DUTIES OF FULL DISCLOSURE CANNOT OCCUR WITHOUT FULL KNOWLEDGE OF THE MATERIAL FACTS AND APPLICABLE LAW

The lower courts ignored the fiduciary duties of full disclosure, ignored the extensive body of federal common law as summarized in *Jones*, but readily found that the Tribe somehow

summarized in *Jones*, but readily found that the Tribe somehow waived or ratified the lawyers' breach. But proper application of the extensive body of state law addressing the issue of waiver or ratification, *supra*, does not square with the lower courts' views. Waiver or ratification of a fiduciary's breach of the disclosure duty "could only be done after a full and complete disclosure of all the facts and circumstances by the fiduciary and and intentional relinquishment by the [cestui que trust] of its rights." *Kane v. Klos, supra*, 50 Wash.2d at 784, 314 P.2d 672; *see United States v. Bennett, supra.* No such disclosure was made here and no independent knowledge was obtained by the Tribe so there was no ratification or waiver.

CONCLUSION

The lower courts failed to apply applicable law and the Tribe's petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID R. LUNDGREN
Tribal Attorney

May 1994

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NISQUALLY INDIAN TRIBE Plaintiff-Appellant, v. CITY OF CENTRALIA; et al., Defendants, v. U.S. DEPT. OF ENERGY; et al., Third-Party-Defendants, v. CULLEN & CULLEN, Appellee.	C.A. No. 92-36836 D.C. No. CV-75-31-CRD **MEMORANDUM*** **Filed February 25, 1994**

On Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Argued and Submitted February 4, 1994
Seattle, Washington

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: REAVLEY,** SKOPIL, and LEAVY, Circuit Judges

The Nisqually Indian Tribe appeals the district court's judgment enforcing liens filed by the law firm Cullen & Cullen for costs and attorney fees owed to the firm and to associating attorneys under a contingency contract. We affirm.

1. Computation of Attorney Fees

The firm calculated attorney fees based on present values placed on the Tribe's settlements with the cities of Tacoma and Centralia by the settlement negotiating team. The Tribe argues that these present values were an improper basis for attorney fees.

The Tribe argues that the valuation of a recovery for the purpose of calculating attorney fees must, as a matter of law, deduct the costs of the recovery from the value of the benefits received, and that the negotiating team's present value figures do not include such deductions. Under Washington law, however, contracts for attorneys' services may provide compensation based on a percentage of the gross recovery. See Luna v. Gillingham, 57 Wash. App. 574, 789 P.2d 801, 803-805, rev. denied, 115 Wash. 2d 1020, 802 P.2d 125 (1990). The question is thus one of the parties' intent under the contract.

The strongest evidence as to the parties' intent in this case is the admission of the Nisqually Business Committee in its Resolution No. 6-1990, in which it states that "the agreed $15.6 million 1987 present value of the [Tacoma] settlement entitles the attorneys to a fee award of $1.76 million." Additionally, Committee Chairman Dorian Sanchez indicated in his November 20, 1990 letter to the Tribe that attorney fees for the Centralia settlement would be $220,000. As the Tribe's net recovery

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** The Honorable Thomas M. Reavley, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

under both settlements is too low to yield these amounts, these statements by the Tribe indicate that the parties intended that the attorney fees would be based on the gross recovery.

This conclusion is not precluded by a memo from the Bureau of Indian Affairs (BIA) that required that the contract term governing attorney fees be changed from "the value or the amount" to "the amount" of recovery so that the Tribe would not be liable for a percentage of a recovery that was not cash or convertible to cash. Under these settlements, the Tribe has received enough cash to cover attorney fees up to the contractual maximum. As the most probable concern underlying the BIA memo is that the Tribe might be liable for attorney fees even if it received no cash recovery out of which to pay those fees, the memo does not require an interpretation of the contract limiting the attorneys to a percentage of the net recovery.

The Tribe also argues that the present values placed on the settlements by the negotiating team should not be used for determining attorney fees because the attorneys have not given an accounting of how those values were determined. Under Washington law, attorneys must explain the basis for the calculation of contingent attorney fees. Wash. Rules of Professional Conduct 1.5(c) (1989). Because the present value figures were arrived at by economists working for Tacoma and Centralia and were allegedly inflacted to serve the interests of the cities, and because the attorneys allegedly encouraged the Tribe to accept these inflated figures, the Tribe argues that the attorneys must show through an accounting that the values were in fact accurate.

However valid these arguments may have been had the attorneys simply billed the Tribe for fees based on these figures, however, here the Tribe has admitted that the figures were correct for the purpose of determining fees in its Resolution 6-1990[1] and in Sanchez' letter to the Tribe. While such

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[1] In most circumstances this resolution would amount to an executory accord, the terms of which the attorneys could enforce as a contractual agreement in its own right. See

admissions are not conclusive, other evidence supports the conclusion that the attorneys are entitled to fees of $2 million, as admitted in these documents. Economist Dr. Eugene Silberberg's affidavit shows that the present value of gross cash payments under the combined settlements is between $16,400,954 and $21,458,635. A review of Dr. Silberberg's analysis and of the terms of the settlements indicate that these figures are a fair estimate of the cash components of the settlements. In addition, the parties agree that the "amount of recovery" should include real estate received by the Tribe, the value of which is not included in these figures.

The contract provides that the attorneys are entitled to fees of $2 million if the Tribe's probable recovery equals a present value of at least $20 million. That amount is well within the range of probable cash and cash-convertible recovery by the Tribe, as indicated by Dr. Silberberg's affidavit. We therefore affirm the district court's holding that the attorneys are entitled to fees of $2 million, as admitted by the Tribe.

We reject the Tribe's contention that the lien should not be enforced because the attorneys allegedly committed several misdeeds over the term of this contract. As enforcement of a lien is an equitable action, the district court's holding is reviewed for abuse of discretion. See Diaz v. San Jose Unified School Dist., 861 F.2d 591, 595 (9th Cir. 1988); cf. Chambers v.

Perez v. Pappas, 98 Wash. 2d 835, 659 P.2d 475, 478 (1983); 6 Corbin on Contracts § 1312 (1951). Such an agreement cuts off defenses and arguments based on the underlying contract. See Northwest Motors, Ltd. v. James, 118 Wash. 2d 294, 822 P.2d 280, 286 (1992). Although the Tribe's resolution cannot constitute an executory accord because an accord amounts to a substituted contract and would thus require approval by the BIA, see 25 U.S.C. §§ 81, 476, as an admission it is compelling evidence that the amount agreed upon is correct. See 6 Corbin on Contracts § 1308 (1951). The Tribe's argument that approval of the resolution was induced by fraud or coercion is not supported by the record.

Nasco, Inc., 111 S. Ct. 2123, 2138 (1991) (district court decision as to attorney sanctions reviewed for abuse of discretion). A review of the record indicates that the district court did not abuse its discretion in enforcing the lien for the full amount of the attorney fees due under the contract.

2. Knodel's Costs

The Tribe argues that because the attorneys have never given an accounting of how their fees were calculated, the Tribe cannot know if attorney Knodel's costs were deducted from the recovery before the fees were calculated, as required by the contract. The Tribe contends that the attorneys' failure to give such an accounting amounts to a waiver of the right to claim Knodel's costs.

It has been clear from the outset, however, that the fees were calculated by applying the contractual percentages to the present values of the settlements agreed on by the negotiating team. The deduction of costs from the present values does not come close to reducing the recovery to the point where the attorneys would not be entitled to the contractual maximum fees. Since an accounting would have told the Tribe nothing that it did not already know, the Tribe was not prejudiced by the lack of an accounting, and thus cannot avoid payment of Knodel's costs on that basis.

The Tribe also argues that Cullen & Cullen lacks standing to file an attorney's lien in behalf of Knodel's estate. We disagree. Nothing prohibits the firm from filing liens on the settlement money in its possession to cover all of the costs and fees of all of the attorneys who associated in the course of the litigation and who were to be compensated under the same contract. The district court thus did not err in enforcing the lien for Knodel's costs.

3. Interest on the District Court Judgment

The district court's order includes the provision that "[a]fter the entry of judgment interest on the judgment will be calculated at the statutory rate." As both parties agree that the only interest that the firm is entitled to is interest actually earned on money in its possession, the judgment will be modified to exclude this provision.

AFFIRMED AS MODIFIED. Each side to bear its own cost for this appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NISQUALLY INDIAN TRIBE Plaintiff-Appellant, v. CITY OF CENTRALIA; et al., Defendants-Appellees, v. U.S. DEPT. OF ENERGY; et al., Third-Party-Defendants, Appellees.	)	No. C75-31(T)D ORDER Filed April 3, 1992

THIS MATTER comes before the Court on cross-motions for summary judgment filed by the Nisqually Indian Tribe and the law firm of Cullen & Cullen. The Court having heard oral argument and having considered the briefs, affidavits and other supporting material submitted by the parties hereby denies the Tribe's motion and grants the Firm's motion.

BACKGROUND

In 1979 the Nisqually Indian Tribe ("the Tribe"), the law firm of Cullen, Holm, Hoglund and Foster ("the Firm"),[1] and attorney Arthur Knodel entered into a contract for legal services to be rendered in a dispute between the Tribe and the cities of

[1] Cullen, Holm, Hoglund & Foster subsequently reorganized as Cullen, Holm & Foster, and is now known as Cullen & Cullen.

Centralia and Tacoma concerning losses caused by hydroelectric projects on the Nisqually River. This contingent fee agreement capped the amount of fees that could be earned at $1.375 million. The contract was approved by the Bureau of Indian Affairs ("BIA").

In 1981, the Tribe and the Firm renegotiated this contract setting the new cap on legal fees at $2 million. The new contract did not employ Arthur Knodel, who had become a judge, but did provide that he would be paid for costs and services already rendered. This contract was retroactively approved by the BIA on August 27, 1990.

The Firm represented the Tribe in litigation with the two cities, which resulted in a settlement with the City of Tacoma approved on September 29, 1989. At the time of this settlement the negotiating teams from the Tribe and the City set the present value of the settlement at $15.6 million. The Tribe entered into a settlement with the City of Centralia, which was approved on March 1, 1991. The negotiating team from the Tribe set the present value of this award at approximately $10 million. The settlements included complex provisions involving cash payments, the setting of permanent minimum flows on the Nisqually River for fish protection, funding for the operation of the Tribe's fish hatcheries, Tribal access to the cities' professionals for consulting and to the cities' jobs and job training programs for Tribal members, and land transfers.

On January 26, 1990, the Nisqually Business Committee passed a resolution that set the present value of the Tacoma agreement at $15.6 million. According to the terms of the 1981 fee contract, the Committee also authorized the payment of $1.78 million in fees to the Firm. The Committee meeting was held at the offices of the Firm, and the resolution was drafted by the Firm. To date the Firm has been paid $715,000 of the $1.78 million in fees authorized by the Committee.

After the Centralia agreement was approved on March 1, 1991, the Firm sought approval from the Nisqually Business Committee to set the present value of the Centralia agreement at $10.6 million, and asked that the Tribe acknowledge that according to the 1981 fee contract the fee would be $530,000.

However, since the Tribe had already authorized the payment of $1.78 million pursuant to the Tacoma agreement, and since the 1981 fee contract capped fees at $2 million, the firm requested payment of just $220,000 in fees to bring the total fees paid to $2 million.

In response the Tribe on April 1, 1991 informed the Firm that it would not agree to pay any more attorney's fees until the Firm had answered certain questions concerning the validity of the 1981 fee contract, the method of calculating the "present value" of the settlement awards, and other questions concerning the Firm's conduct and entitlement to the fees.

On April 10, 1991, the Firm took action to secure its interest in funds owed by the Tribe. The Firm filed an attorney's lien on $1,311,644 that had been held in the trust fund established by the Firm for the Tribe. These funds were part of the payments made by the cities of Tacoma and Centralia. The Firm stated that the Tribe owed it $2 million in fees, but had paid only $715,000. Thus the Firm placed a lien on $1.285 million for the remaining fees owed. The amount of the lien beyond this figure was to cover certain costs the Firm claimed were owed. At the same time that the Firm filed the lien, it transmitted approximately $1.5 million to the Tribe, which was the remaining balance in the Tribe's trust fund. In addition to the lien filed on the money, the Firm filed a lien on the Tribe's files in its possession, and upon any future judgment payments owed by the cities of Centralia and Tacoma.

DISCUSSION

The issue before the Court is whether the Firm's lien should be quashed. This requires the Court to determine if the Firm is entitled to the fees and costs it claims. As the Court is considering cross-motions for summary judgment, the question is whether there are genuine issues of material fact and whether one side is entitled to judgment as a matter of law. In general, this dispute is governed by Washington's attorney lien statute, RCW 60.40.010 et seq., which the Court enforces through its equitable powers. Price v. Chambers, 148 Wash. 170, 172, 268 P. 143 (1928).

A. The 1981 Contract

The Tribe argues that the 1981 contract is invalid for lack of consideration, and because the Firm breached its duty to fully disclose the facts upon which the contract was based. Once the attorney-client relationship is established, if a fee agreement is renegotiated "and results in greater compensation than counsel was entitled to under the original agreement, courts may refuse to enforce the renegotiation unless it is supported by new consideration." Perez v. Pappas, 98 Wn.2d 835, 841, 659 P.2d 475 (1983). "Such modification is considered to be void or voidable until the attorney establishes that the contract with his client was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts upon which it is predicated." Ward v. Richards & Rossano, Inc., 51 Wn. App. 423, 429, 754 P.2d 120 (1988). The Tribe claims that there was no additional consideration because the Firm did not promise to provide any additional services beyond those it was already obligated to provide under the terms of the 1979 fee agreement, and the claims the Firm failed to disclose the fee increase.

The Court need not discuss these allegations at length because the Tribe ratified the contract in 1989 and thereby corrected any deficiencies that may have existed. Moreover, the Court finds that the unambiguous terms of the contract show that in exchange for a fee increase the Tribe at a minimum received a two-year extension of the attorney's services, and a deletion of the requirement that it repay costs to Arthur Knodel according to the payment schedule in the 1979 contract. With regard to the allegation that the Firm failed to disclose the facts upon which the contract modification was predicated, the Firm has submitted uncontested evidence showing that the proposed contract was submitted in writing, Scott Tr. 11-12, the contract was discussed with the attorneys at meetings and some minor modifications were made, Richard Wells Tr. 26-28, Scott Tr. 7-8, and finally that the contract was discussed at a Tribal council meeting and approved 30-0. Firm's Dep. Ex. 11. The Tribe was presented with the terms of the contract, considered the terms fully, and approved the contract. This evidence does not support the Tribe's allegation that the Firm failed to properly disclose the

facts underlying the contract or the alleged lack of consideration for the contract.

Most importantly, however, the Tribe ratified this contract in 1989 after enjoying its benefits for eight years. A voidable contract, such as one made through the abuse of a fiduciary relationship, may be ratified if after the discovery of the facts that would warrant rescission, a party remains silent or continues to accept benefits under the contract. A party charged with ratification must have acted voluntarily, with full knowledge of the facts. Ward, 51 Wn. App. at 433. In order for the Tribe to have ratified the contract, it would have had to know of the facts that could have supported its original claim for rescission, i.e., alleged lack of consideration and the Firm's alleged failure to disclose the lack of consideration.

The Firm points out several uncontested facts. In a memorandum of September 14, 1989, Tribal attorney Lundgren made a point-by-point comparison of the 1979 contract and the 1981 contract, in which he made clear that there was an increase of $625,000 in allowable fees, and his opinion that the 1981 contract was void because it was never approved by the Bureau of Indian Affairs. Firm's Dep. Ex. 15. The Tribe did not question the contract for lack of consideration at that time, but instead ratified the contract and resubmitted it to the BIA for retroactive approval "as quickly as possible." Firm's Dep. Ex. 4. The BIA approved the contract. Firm's Dep. Ex. 18. In addition, the Tribe continued to accept the benefits of the contract through March 1, 1991 when the District Court approved the Centralia agreement. In a letter dated November 20, 1990, the Tribal Chairman laid out the terms of the Centralia agreement and praised the work of the attorneys. Firm's Dep. Ex. 12.

These facts establish that the Tribe and its attorney knew the material terms of the contract including the increase in the maximum fee allowed and the services to be provided. With this knowledge the Tribe ratified the contract in 1989, and cannot now assert that it did not know the facts underlying its claim that the 1981 contract lacked consideration and that this lack of consideration was not disclosed by the Firm. By accepting the

benefits of the contract for ten years and approving the contract after eight years the Tribe has ratified the 1981 contract. The contract terms are fair and reasonable, and the Tribe received a great benefit from the Firm. As a result the parties are bound by the 1981 contract.

B. Valuation of the Settlement

The Tribe claims that the valuation of the present values of the Tacoma and Centralia settlements were too high. The Tribe asserts the Firm is responsible for this because the attorneys breached their fiduciary duty to the Tribe by failing to advise the Tribe to seek an independent valuation, to advise the Tribe that the present values would be used to calculate attorney's fees, and by allowing the Tribe to include Federal Energy Regulatory Commission ("FERC") mitigation measures as part of the value of the settlements.

The facts concerning the negotiations with the cities and the setting of the present values are largely uncontested. The formulation of the Tribe's settlement positions and the settlement negotiations were controlled by the Tribe. Firm's Req. for Admissions 26. The Tribal Chairman at the time insisted upon establishing an agreed present value between the Tacoma and Tribal negotiators. Firm's Req. for Admissions 27. The Tribe worked with an economist from the City of Tacoma to arrive at a present value of $15.6 million, which was adopted by the Tribe in Resolution No. 60-1990. Members of the Tribe understood that the approximately $15 million present value would be used in calculating attorney's fees. For the Centralia settlement the Tribe worked with Centralia's consulting firm CH2MHill, and also ran its own computer programs to evaluate the settlement. The Tribe developed computer based estimates ranging from $7.3 to $10.2 million. Firm's Dep. Ex. 16. Members of the negotiating team indicate that the Tribe and Centralia agreed upon a present value of about $10 million. Mercado Tr. 19-20; Scott Tr. 32-33.

The Tribe relies on Perez, Ward, and Ravsten v. Department of Labor & Industries, 108 Wn.2d 143, 156-59, 736 P.2d 265 (1987), to establish that the Firm owed the Tribe a duty to advise it to seek an independent economic valuation of

the settlement, and to advise it that the present value figures would be used to determine attorney's fees. The cited cases, however, do not establish these duties, and so cannot invalidate the Tribe's decision to place present values on its settlements.

The Tribe also argues that the Firm is not entitled to any fees based on the value of mitigation measures to be used in FERC relicensing hearings. The Tribe refers to an October 3, 1979 memorandum from Dale H. Itschner, Assistant Regional Solicitor, United States Department of Interior. Itschner stated, "if, in the FERC proceedings, the FERC mandates the licensees to take certain measures to mitigate for diminishment of the fishery," the Firm should not receive fees based on the value of this recovery. The Firm correctly notes, however, that the Tribe did not recover FERC mandated mitigation measures, but instead recovered benefits conferred by the cities in exchange for the dismissal of damages claims against the cities in this Court. The settlements awarded benefits directly to the Tribe. As such, the Tribe's argument must fail.

As the attorneys did not breach any duties by allowing the Tribe to determine the present value of the settlements in conjunction with the cities, and no improper items were valued in the settlements, the Tribe must honor the present values that were determined at the time of the settlements. These values were used by the Tribe when it decided to accept the settlement, and indeed, Dorian Sanchez stated that at the time of the settlements the Tribe believed the settlements would form the basis of the attorney's fees. Dorian Sanchez Tr. 52. Moreover, the Court is unpersuaded by the affidavits of Dr. Charles Pace who estimated the value of the settlements to be about one-fifth of the value originally assessed by the Tribe and the cities.

C. Attorney Misconduct

"Professional misconduct may be grounds for denying an attorney his fees." Ross v. Scannell, 97 Wn.2d 598, 610, 647 P.2d 1004 (1982).

> It is apparent that while attorney misconduct can be so egregioius as to constitute a complete defense to a claim for fees, not every act of misconduct will justify such a serious penalty. It is implicit in the Ross opinion that the

trial court has discretion in deciding what impact, if any, lawyer misconduct will have on a claim for attorney's fees.

Kelly v. Foster, 62 Wn. App. 150, 156, 813 P.2d 598 (1991).

The Tribe levels several charges of misconduct at the Firm. The Tribe claims the Firm breached its duties by overvaluing the settlement agreement, failing to secure timely BIA approval of the 1981 contract, failing to communicate, charging excessive fees, renegotiating the 1979 contract without full disclosure, failing to account for fee calculation, maintaining a conflict of interest with the Tribe during representation, mismanaging and converting Tribal funds, and making misrepresentations to the Court.

The Court finds no basis in the record for charges of misconduct such that the Firm's fee should be reduced, especially in light of the value conferred on the Tribe by the Firm. The Firm worked on behalf of the Tribe for many years, without complaint from the Tribe until a successful result had been achieved, and the Firm sought its contractual fees.

D. **Arthur Knodel's Costs**

Arthur Knodel was the first attorney to undertake the representation of the Tribe in 1971. He left the litigation in 1981 when he became a judge. The 1981 contract provided that the Tribe would pay Knodel "in good faith as rapidly as possible" $20,670.06 in costs he had advanced to the Tribe. The Tribe has never paid these costs. Knodel has since died, and the Firm is seeking to recover those costs for his estate at the request of his widow. The Tribe claims that the Firm has no standing to collect Knodel's costs, and in the alternative that the costs cannot be paid because under the contract all costs were to have been deducted from the settlements before the contingent fee was calculated. The parties have not briefed this issue sufficiently to warrant granting summary judgment to either side.

CONCLUSION

The Court finds there are no genuine issues of material fact and that the Firm is entitled to the fees it claims, and therefore the lien is valid in regard to those fees. The Firm's lien will not be quashed. The Court has not, however,

determined the validity of the Firm's claim for costs beyond the $1.285 million claimed for fees. Any disputes concerning the Firm's entitlement to these costs should be addressed through additional motions.

THEREFORE, the Nisqually Indian Tribe's motion for summary judgment is DENIED. The law firm of Cullen & Cullen's motion for summary judgment is GRANTED to the extent that its lien on the claim to $1.285 million in fees is hereby declared valid.

The Clerk of the Court is directed to send copies of this Order to all counsel of record.

DATED this 3 day of April, 1992.

/s/ CAROLYN R. DIMMICK
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NISQUALLY INDIAN TRIBE	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. C75-31(T)D
	)	
CITY OF CENTRALIA; et al.,	)	
	)	ORDER
Defendants-Appellees,	)	
	)	
v.	)	
	)	
U.S. DEPT. OF ENERGY; et al.,	)	
	)	
Third-Party-Defendants, Appellees.	)	**Filed July 13, 1992**
	)	

THIS MATTER comes before the Court on cross-motions for summary judgment regarding costs filed by the law firm of Cullen & Cullen ("Firm") and the Nisqually Indian Tribe ("Tribe"). The Court having considered the briefs, affidavits and other supporting materials submitted by the parties hereby grants the Firm's motion and denies the Tribe's motion.

BACKGROUND

The factual background of this case has been summarized in detail in the Court's order of April 3, 1992. This dispute has centered on the Firm's entitlement to $1,307,188.97 in Tribal funds. The amount of $1,285,000.00 in fees to the Firm was approved by the Court on April 3rd. The following facts are relevant to the current motions concerning the remaining money in dispute. Arthur Knodel ("Knodel"), a sole practitioner, began representing the Tribe in 1971. It is undisputed that Knodel advanced $20,670.06 to the Tribe, which has never been paid.

In 1981, he became a Pierce County judge and left the litigation. Knodel died in 1985. The Firm is now seeking to recover those costs for his estate at the request of Knodel's widow. The Firm does not contest the Tribe's entitlement to the $1,518.91 difference between the Knodel costs and the total amount of Tribal funds remaining in dispute.

DISCUSSION

Many of the Tribe's assertions have been addressed in the Court's April 3rd order. Two major arguments put forth by the Tribe remain unaddressed: (1) the Firm lacks standing to assert a lien on behalf of Knodel; and (2) the language of the agreement itself estops the Firm from asserting this claim. As the Court is considering cross-motions for summary judgment, the Court must decide whether there are genuine issues of material fact, and whether one side is entitled to judgment as a matter of law. As the funds in question are held under lien, Washington's attorney lien statue, RCW 60.40.101 et seq., governs this dispute.

1. Standing

The Tribe asserts that under Washington law the Firm has no standing to assert a lien on behalf of Knodel because the language of the lien statute allows only Knodel himself to assert the claim. The Tribe cites the case of Gust v. Judd, 88 Wash. 536, 153 P. 309 (1915), in support of its argument. While the Tribe correctly finds that Gust holds that a lawyer may not assert a lien for claimed expenses unless those expenses have been paid by the lawyer, id. at 541, the Tribe is mistaken that the holding of Gust requires those expenses to have been paid personally by the lawyer asserting the lien. Gust held that a lawyer could not assert a lien for outstanding unpaid expenses, but liens can be asserted for just claims for paid expenses. Id. The Tribe does not dispute that Knodel has a just claim for expenses incurred by Knodel on behalf of the Tribe.

The Tribe then asserts that Mrs. Knodel cannot assign to the Firm her right to recover the costs by asserting an attorney's lien. The Tribe relies on the language of section 11 of the agreement, which states that no assignments under the agreement can be made by the attorneys without approval from the Tribe.

Under the circumstances of this case, it is unnecessary for the Court to decide the exact nature of the relationship between Mrs. Kodel and the Firm. Mrs. Knodel authorized the firm to collect the money for her, and has taken steps to collect the money on her own, therefore the Firm is not acting as an assigned, as the Firm is not collecting the money for itself. Also, the Firm does not have to receive an actual assignment from Mrs. Knodel to collect the money as (a) Knodel was associated with the Firm in the litigation, and (b) the Tribe has acknowledged in the letter sent to Mrs. Knodel's attorney that the Tribe believed the Firm was successor in interest for all attorneys in the case. Furthermore, Washington law holds that an attorney's right to lien can only be expressly waived. See Niagara Fire Ins. Co. v. Hart, 13 Wash. 651, 43 P. 937 (1896). Neither Knodel, nor Mrs. Knodel, nor the Firm has ever expressly waived their right to an attorney's lien for the Knodel costs. However the relationship between Mrs. Knodel and the Firm is defined, applying the strict construction required by the lien statute the Court finds that the Firm has standing to assert this lien.

2. Estoppel and Waiver

The Tribe argues that the Firm is estopped from collecting the Knodel fees for two reasons. The Tribe argues first that it relied on the language in section 9 of the agreement in concluding that Knodel would be paid by the Firm after the Firm received its share of the settlement. The Tribe next argues that since it has never been told how the fees were calculated, the Tribe is justified in assuming that the costs should have been paid. According to the Tribe, both reasons demonstrate that the Firm is either estopped from, or has waived, the right to collect the Knodel fees.

Section 9 of the agreement is entitled "Legal Costs." Section 9 states that, "All costs advanced by attorneys . . . shall be deducted from the amount of the recovery before provision for attorney's fees and shall be paid directly to the party incurring said costs." The Tribe argues that this clause means that the Knodel costs should have been paid prior to the payment of fees to the Firm, or that the Firm should have paid

Mrs. Knodel these costs from their earlier receipt of fees and costs, and therefore that the Firm has no further claim against the Tribe for Knodel's costs.

The Court interprets the wording of section 9 as not demanding payment of costs before payment of fees. Section 9 is more properly characterized, as the Firm asserts, as a method of fee calculation, rather than a payment schedule. As the Tribe states in its memorandum, in response to the Firm's motion, and in support of its own motion: "By deducting and paying out all costs before fees were calculated and paid, the client would be better able to know what its actual recovery was and the attorneys would not be paid their fees based on a percentage of recovery value that included their costs."

Even if the wording of the agreement is ambiguous, the Court can interpret an integrated agreement as a matter of law. Berg v. Hudesman, 115 Wn.2d 657, 669, 801 P.2d 222 (1990). Neither party has characterized the agreement as other than integrated. As the Court construes the language of section 9 of the agreement as regulating the calculation of fees, and not as requiring the payment of costs before fees, the Court need not address the Firm's argument that the Knodel costs were a separate obligation.

The Court's April 3rd ruling has already addressed the Tribe's assertions that the Firm is estopped from or has waived its right to assert Knodel's claim based on the methods used to calculate the Firm's fee award. The Tribe's assertions of attorney misconduct as grounds for estoppel or waiver have been mooted by the Court's April 3rd ruling finding the fee agreement to be valid.

THEREFORE, the Firm's motion for summary judgment is GRANTED to the extent that its lien on and claim to $20,670.06 for the Knodel costs is declared valid, and the Tribe's motion for summary judgment is DENIED.

The Clerk of the Court is directed to send copies of this Order to all counsel of record.

DATED this 13 day of July, 1992.

/s/ CAROLYN R. DIMMICK
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NISQUALLY INDIAN TRIBE Plaintiff-Appellant, v. CITY OF CENTRALIA; et al., Defendants-Appellees, v. U.S. DEPT. OF ENERGY; et al., Third-Party-Defendants, Appellees.	)	No. C75-31(T)D ORDER Filed September 16, 1992

THIS MATTER comes before the Court in the form of a dispute between the parties about the entry of judgment. Through the granting of two summary judgments the firm of Cullen & Cullen (the "Firm") has become entitled to a judgment in its favor against the Nisqually Indian Tribe (the "Tribe"). However, the Court is concerned about the Firm's statement that it currently holds interest that accumulated on the Tribe's funds prior to the filing of the Firm's lien.

Before judgment is entered, the Firm is ORDERED to return all funds to the Tribe that are not under a lien. The Firm is also ORDERED to explain whether and why it possesses funds that should have been turned over to the Tribe. The Firm must also provide the Tribe with a full accounting of all money taken in by the Firm as a result of the settlements with the cities of Tacoma and Centralia, all interest earned thereon, and all money that has been distributed or remains under lien. Any money

owed to the Tribe must be returned, and an explanation about such money and an accounting must be provided to the Tribe and the Court, within thirty (30) days of the date of this order.

The Clerk of the Court is directed to send copies of this Order to all counsel of record.

DATED this 16 day of September, 1992.

/s/ CAROLYN R. DIMMICK
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NISQUALLY INDIAN TRIBE	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. C75-31(T)D
	)	
CITY OF CENTRALIA; et al.,	)	
	)	ORDER
Defendants-Appellees,	)	
	)	
v.	)	
	)	
U.S. DEPT. OF ENERGY; et al.,	)	
	)	
Third-Party-Defendants, Appellees.	)	Filed October 20, 1992
	)	

THIS MATTER comes before the Court at the request of the parties for entry of judgment. This dispute concerns the validity of a lien held by the law firm of Cullen & Cullen ("the Firm") on funds currently held in trust for the Nisqually Indian Tribe ("the Tribe"). The Court has ruled that the firm is entitled to $1,285,000 in attorneys' fees, and $20,670.06 for Arthur Knodel's costs. Accordingly, the Firm's lien has been declared valid as to these amounts.

The Firm has submitted an accounting of the funds it has collected and disbursed on behalf of the Tribe. Notwithstanding the Tribe's criticism, the Court is satisfied that the Firm did not retain any money for which it did not have a claim to after it filed lien no. 5. However, the Firm's accounting does show that it currently holds $1,768.18 more than the Court ordered fees and costs, and the interest accumulated on the funds held under

lien. The Court has not ruled that the lien is valid as to this $1,768.18, and so judgment will not be entered for that amount.[1]

Judgment will be entered in the amount of $1,305,670.06, which represents the Firm's entitlement to $1,285,000 in attorneys' fees and $20,670.06 for Arthur Knodel's costs. The remaining question for the Court to decide is the amount of prejudgment interest the Firm is entitled to receive on these funds. The Firm is clearly not entitled to receive prejudgment interest on the Knodel costs, but is entitled to some prejudgment interest on the fees as the Firm made a valid claim for a sum certain on April 9, 1992. Smith v. Olympic Bank, 103 Wn.2d 418, 425 (1985).

Both parties agree that if awarded, prejudgment interest on the $1,285,000 in fees should start running from April 9, 1991. The Firm claims it is entitled to prejudgment interest at the maximum statutory rate as provided in RCW 19.52.010, while the Tribe asserts that the Firm should receive only the interest that has actually been earned on the money.

The Court must agree with the Tribe. This action in equity concerns the validity of the Firm's lien pursuant to the Washington Attorney's Lien Statute RCW 60.40.010 et. seq. The statute permits liens against funds held by an attorney belonging to an attorney's client, but does not authorize liens to be filed against money held by a client. RCW 60.40.010. As such, when enforcing the statute the Court cannot compel the payment of funds beyond those secured by a lien. Thus the Firm may recover only the amount of interest actually earned on the funds held under the lien. Recognizing that this amount will be substantially less than would be available in a typical contract action pursuant to RCW 19.52.010, the Court will permit the

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[1] The Firm asserts its entitlement to this amount at page 5, footnote 1 of its October 13, 1992 Memorandum. As judgment will not be entered for this amount, the Court suggests that the Firm return this money to the Tribe rather than litigating its entitlement to this relatively small amount.

Firm to retain the interest earned from April 9, 1991 to the date of judgment on all the money subject to lien No. 5.

THEREFORE, the Clerk of the Court is directed to enter judgment against the Nisqually Indian Tribe in favor of the law firm of Cullen & Cullen for attorneys' fees and costs in the amount of $1,305,670.06 along with the prejudgment interest actually earned on the total amount of the money subject to lien No. 5 from April 9, 1991 to the date of judgment. After the entry of judgment interest on the judgment will be calculated at the statutory rate.

The Clerk of the Court is directed to send copies of this Order to all counsel of record.

DATED this 20 day of October, 1992.

/s/ CAROLYN R. DIMMICK
United States District Judge

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NISQUALLY INDIAN TRIBE	C.A. No. 92-36836
Plaintiff-Appellant,	D.C. No. CV-75-31-CRD
v.	
CITY OF CENTRALIA; et al.,	
Defendants,	
v.	
U.S. DEPT. OF ENERGY; et al.,	**ORDER**
Third-Party-Defendants,	**Filed April 14, 1994**
v.	
CULLEN & CULLEN,	
Appellee.	

On Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Before: REAVLEY,* SKOPIL, and LEAVY, Circuit Judges

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* The Honorable Thomas M. Reavley, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

The panel has voted to deny the petition for rehearing. The full court has been advised of the en banc suggestion and no judge of the court has requested a vote. Accordingly, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NISQUALLY INDIAN TRIBE	)	C.A. No. 92-36836
	)	
Plaintiff-Appellant,	)	D.C. No. CV-75-31-CRD
	)	
v.	)	
	)	
CITY OF CENTRALIA; et al.,	)	
	)	
Defendants,	)	
	)	
v.	)	
	)	
U.S. DEPT. OF ENERGY; et al.,	)	**ORDER**
	)	
Third-Party-Defendants,	)	**Filed April 28, 1994**
	)	
v.	)	
	)	
CULLEN & CULLEN,	)	
	)	
Appellee.	)	
	)	

On Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Before: SKOPIL, Circuit Judge

The motion for a stay of the mandate pending application to the Supreme Court for a writ of certiorari is granted.

(2)

Supreme Court, U.S.
FILED
JUN 17 1994
OFFICE OF THE CLERK

NO. 93-1941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NISQUALLY INDIAN TRIBE,

Petitioner,

v.

CULLEN AND CULLEN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Culp, Guterson & Grader

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I.

INTRODUCTION

There is nothing about this lawsuit that calls for review by the United States Supreme Court. It is, simply, a contract dispute governed by long-standing principles of state law. No issue of great public importance is presented. The lower court rulings rest almost entirely on the facts of this particular case rather than on any new or remarkable pronouncement of law. The public interest will be so little affected by the outcome of this litigation that neither the District Court nor the Ninth Circuit Court of Appeals saw fit even to publish their opinions. Petitioner lost in the trial court and in the Ninth Circuit for the simple reason that it failed to present any persuasive evidence supporting its contentions. Under these circumstances, no useful purpose would be served by issuance of a writ of certiorari.

II.

STATEMENT OF THE CASE

This matter involves a dispute between a client (the Nisqually Indian Tribe) and its attorneys (Cullen & Cullen and other associated attorneys) at the conclusion of successful litigation spanning a period of more than 15 years.

The relationship between the Tribe and its attorneys was governed by a series of contingent fee agreements. The final contingent fee contract, dated June 4, 1981, was for a period of ten years. CR 235, Lyon Aff., Ex. 1. That contract required the attorneys to prosecute claims against the cities of Tacoma and Centralia arising from the adverse impact of the cities' Nisqually River hydroelectric projects on the Tribe's fishing rights. The contract provided for an attorneys' fee based upon a percentage of the amount of the recovery realized on behalf of the Tribe, subject to a maximum of $2 million on any recovery of $20 million or more.

The attorneys successfully and completely performed their obligations under the contingent fee contract. For ten years following execution of the 1981 contract, the attorneys prosecuted the litigation before FERC, the United States District Court and through three appeals to the Ninth Circuit. Several thousands of attorney hours were expended in bringing the litigation to a successful conclusion.

In September 1987, the attorneys and the Tribe were able to negotiate a favorable settlement with the City of Tacoma involving numerous provisions for the benefit of the Tribe: large cash payments; the setting of permanent flows on the Nisqually River for fish protection; joint efforts to seek additional federal funding; Tribal access to the city's professionals for consulting and to the city's jobs and job training programs for Tribal members; and the city's support for federal funding projects sought by the Tribe. CR 235, Ex. 14. The Tribe, with the assistance of the city's economist, determined that the present value of the Tacoma

settlement was $15.6 million. CR 296 at 25; CR 299, L. Sanchez Tr. 23-24; CR 297, Ex. 5.

On November 2, 1990, following the completion of a successful appeal to the Ninth Circuit, a settlement was reached with the city of Centralia. That settlement was described by the Chairman of the Tribe's Business Committee as "very beneficial to the Tribe." CR 297, Ex. 12. Working with the consulting firm of CH_2MHill, the staff of the Tribe's negotiating team valued the Centralia settlement at approximately $10 million. CR 299, Scott Tr. 29-30, 32, Mercado Tr. 19-20.

Under the terms of the contingent fee agreement, the combined value of the Tacoma and Centralia settlements, $25.6 million, entitled the attorneys to the maximum fee of $2 million. This entitlement was expressly acknowledged by the Tribe. Following the Tacoma settlement, the Tribe's Business Committee unanimously adopted a resolution that "the present value of the [Tacoma] settlement entitles the

attorneys to a fee award of $1.78 million." CR 297, Ex. 5. By letter of November 20, 1990, the Chairman of the Business Committee advised the Tribe that the additional settlement value realized through the agreement with Centralia increased the attorneys' fee entitlement to the contractual maximum of $2 million. CR. 297, Ex. 12.

The Tribe was fully satisfied with the legal representation provided by the attorneys. Over the more than 15-year life of the Tacoma/Centralia litigation, the Tribe never complained about any aspect of the attorneys' work. CR 235. By Resolution of October 25, 1989, the Tribe's Business Committee explicitly expressed satisfaction with the attorneys' services. CR 297, Ex. 4 at 2-4. Upon conclusion of the litigation, the Chairman of the Tribe's Business Committee praised the work of the attorneys in a letter to members of the Tribe. CR 297, Ex. 12.

In April 1991, the Tribe, for the first time, informed the attorneys that it intended to dispute the enforceability of

the contingent fee agreement and the attorneys' entitlement to a fee under that contract. CR 284, Ex. 22 at 235. By that time, the attorneys had performed and the Tribe had received the benefit of ten years of legal services under the 1981 contract, the litigation had been concluded upon terms that were "very beneficial to the Tribe," and the Tribe had already acknowledged in writing the attorneys' entitlement to a $2 million fee.

On May 3, 1991, the Tribe filed in the United States District Court for the Western District of Washington a motion to quash the lien filed by the attorneys in the amount of the unpaid fee. CR 224. The Tribal Attorney, without any evidence to support such an extravagant allegation, accused the attorneys of "a level of attorney misconduct unprecedented in the reported Washington case law." CR 285 at 42. He told the District Court that the 1981 contingent fee contract was void for lack of consideration,

when, in fact, the record clearly showed that there was ample consideration.

The District Court, upon cross-motions for summary judgment, ruled that the undisputed evidence supported, in every respect, the attorneys' entitlement to the maximum fee permitted by the 1981 contract. CR 313. It is apparent from the District Court's opinion that the fatal flaw in the Tribe's position was the total lack of any evidence to support it. For example, in rejecting the Tribe's contention that the attorneys should be deprived of their fee because of breaches of fiduciary duties, the Court found that there was no evidence of any such breach:

> The Court finds no basis in the record for charges of misconduct such that the Firm's fee should be reduced, especially in light of the value conferred on the Tribe by the Firm. The Firm worked on behalf of the Tribe for many years, without complaint from the Tribe until a successful result had been achieved, and the Firm sought its contractual fees.

CR 313 at 11 (emphasis added).

The Tribe appealed to the Ninth Circuit. The Court of Appeals, in affirming the District Court's decision, also remarked on the absence of evidence supporting the Tribe's arguments. Court of Appeals Memorandum, Appendix A to Tribe's Petition, at 3a-4a, n.1.

In seeking a writ of certiorari, the Tribe presents a fictionalized description of the facts.[1] The Tribe attempts to convince the Court that the attorneys inflated the values placed on the Tacoma and Centralia settlements, concealed from the Tribe how the fee was to be calculated, coerced the Tribe into accepting the inflated figures and, thereby, caused the Tribe to agree to an improperly high fee. There is no truth to any of this. Both the District Court and the Ninth Circuit, after thoroughly reviewing the record, found that there was no evidence supporting the Tribe's contentions.

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[1]It is noteworthy that the opening sentence in the Tribe's Statement of the Case —— that "The material facts are undisputed" —— precedes a recitation of factual allegations by the Tribe which were disputed by respondent below and rejected as unsubstantiated by the trial court and the Court of Appeals. See Court of Appeals Memorandum and District Court Order, pp. 3a-4a, 12a-14a to Tribe's Petition.

The record, in fact, shows that the Tribe itself dictated how the attorneys' fee was to be calculated and was fully informed as to how that calculation was performed. The settlement negotiations with the cities were controlled by the Tribe. CR 235 at 8. The Chairman of the Tribe, at the conclusion of the negotiations, insisted upon the calculation of the present value of the settlements. CR 296 at 25; CR 235 at 18. The Tribe, with the assistance of the cities' consultants, calculated the present value of the combined settlements to be $25.6 million. CR 235 at 10; CR 299, Scott Tr. 29-30, 32, Mercado Tr. 19-20. Tribal leaders used these present value figures when presenting the settlements for approval by the membership of the Tribe. CR 299, Scott Tr. 18-19, 32, Mercado Tr. 19-20; CR 297, Ex. 2. At the time of approving the settlements, it was the expectation and intention of the Tribe that these same present value figures would also be used in calculating the attorneys' fees. CR 299, D. Sanchez Tr. 52.

The fees were calculated in precisely the way that the Tribe anticipated and wanted. The percentages set forth in the contingent fee contract were applied to the present values assigned to the settlements by the Tribe. The calculation was fully described by the attorneys to the Tribe at a meeting called and run by the Tribal Chairman. CR 299, D. Sanchez Tr. 38-39, CR 235 at 12. The calculation of the fee resulting from the Tacoma settlement was approved by a unanimous vote of the Tribe's Business Committee. CR 297, Ex. 5. Following the Centralia settlement, the Tribal Chairman confirmed the attorneys' entitlement to the maximum fee of $2 million, apparently based upon his own calculation. CR 297, Ex. 12. The Tribe's present allegations that the fee calculation was forced upon them by the attorneys are a fabrication, totally unsupported by the record.

In its effort to obtain Supreme Court review, the Tribe also mischaracterizes the lower court rulings. The Tribe claims that the District Court held that "the attorneys

had no duty of full disclosure in fixing their fees." Petition at 23. But the District Court made no such holding. Neither the attorneys nor the trial court ever disputed that the attorneys had the obligations of a fiduciary, including a duty of disclosure, in connection with the setting of the attorneys' fee. The District Court ruled against the Tribe, not on the basis of any holding that no duty existed, but instead because there was no evidence that the duty had been breached. See District Court Order, Appendix B to the Tribe's Petition at 12a-14a.[2] The Court of Appeals expressly acknowledged that a duty of disclosure existed, but, like the District Court, rejected the Tribe's allegations that the record showed a breach of that duty. Court of Appeal Memorandum, Appendix A to Tribe's Petition at 3a-5a.

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[2]The District Court did reject the Tribe's contention that Perez v. Pappas, 98 Wash. 2d 835, 659 P.2d 475 (1983), imposed a duty upon the attorneys to advise the Tribe that "present values of structured settlements require complex analysis using calculations best understood by an economist," a contention that finds no support in Perez or any other Washington case.

The Tribe also erroneously contends that the District Court held that "the Tribe's resolution [acknowledging the attorneys' entitlement to their fee] foreclosed the Tribe's ability to challenge the firm's fees." Petition at 23. Again, the District Court made no such holding. Understandably, in reviewing evidence on the question of whether the attorneys were entitled to their fee, the trial court considered the Tribe's Resolution which constituted an admission that the fee was due and owing. But the District Court did not hold that the resolution, standing alone, legally "foreclosed" the Tribe from disputing the fee. See District Court Order, Tribe's Petition at 12a-14a.

The Tribe further distorts the District Court ruling by asserting that it holds that "the successful settlement in the underlying litigation cured the firm's documented misconduct." Petition at 24. In truth, the District Court neither found in the record any "documented misconduct" nor ruled

that a successful settlement would "cure" such misconduct if it existed. Id.

The record establishes that the attorneys prosecuted the Tribe's claims for more than ten years, eventually realizing settlements having a present value to the Tribe of more than $20 million. The attorneys thereby became entitled to the maximum fee permitted by the contingent fee contract. The Tribe acknowledged this entitlement in writing. But, in this lawsuit, the Tribe has attempted to rewrite history: first, by making factual allegations that find no support in the record; and then by mischaracterizing the lower court rulings. This process should go no further. The petition for a writ of certiorari should be denied.

III.

ARGUMENT AGAINST ISSUANCE OF A WRIT OF CERTIORARI

This case presents no issue meriting Supreme Court attention. The lower court decisions involve nothing more than the application of established state law to the facts of

this particular case. Neither the District Court nor the Court of Appeals decided any question of law in a way that conflicts with the decisions of the Supreme Court or any other federal court.

A. NO ISSUE OF PUBLIC INTEREST IS PRESENTED

Unquestionably, the outcome of this matter is important only to the litigants. Rather than deciding any new or controversial legal question, the District Court and Court of Appeals opinions focus on the peculiar facts of this case: the unique terms of the contingent fee agreement and the Tacoma and Centralia settlements; the calculation of the present value of the settlements and the attorneys' fees; and the Tribe's written admissions that the attorneys were entitled to their fee. To reach their decisions, the lower courts needed only to apply existing Washington law to the undisputed facts. The District Court and the Court of Appeals rejected the Tribe's arguments simply because the Tribe failed to produce evidence supporting its allegations. Because the lower court

rulings were driven primarily by the unique facts of this case, those rulings have no application to other disputes and parties. In deciding that their opinions would not be published, the District Court and the Court of Appeals clearly signalled their conclusion that this matter involves no issue of broad public interest.

B. NO FEDERAL QUESTION IS PRESENTED

Neither the District Court nor the Court of Appeals decided any question of federal law. Until now, both the Tribe and the attorneys have consistently taken the position that Washington State law applies to this dispute. See, e.g., CR 283 at 6 ("The Firm agrees with the Tribe's assertions . . . that RCW 60.40.010 et seq., Washington's attorney lien statutes, apply in this proceeding"). The District Court opinion rests entirely on state law, citing not a single federal case or statute. Similarly, the Court of Appeals relied exclusively on state law in deciding all substantive issues.

In its Petition for Writ of Certiorari, the Tribe argues, for the first time, that there should be "a federal common law rule that fiduciary duties of full disclosure are necessary to protect clients directly in the attorney-client relationship." Petition at 25-26. This is a transparent, eleventh-hour attempt by the Tribe to fabricate a "federal question" so as to obtain Supreme Court review. The attempt should not succeed. First, Supreme Court Rule 10 contemplates that a writ of certiorari will issue with respect to a federal question only after that question has been decided by a Court of Appeals or state court of last resort. Here, neither the District Court nor the Court of Appeals was called upon to decide the existence or scope of any "federal common law rule" of full disclosure. Instead, the Tribe presented the attorneys' fiduciary duty issue as a question of state law and relied on Washington State law in making its arguments. See Brief of Appellant to Court of Appeals at 23-26. As discussed above, the lower courts decided this case based upon

state law. The Tribe should not now be permitted to assert that federal substantive law applies when the Court of Appeals has never been presented with that question.

Furthermore, the Tribe makes no showing that the result in this case would be altered in any respect by application of a "federal common law rule." The Tribe failed in the lower courts, not as a result of an adverse ruling on any question of law, but, rather, because of a paucity of evidence that the attorneys engaged in any misconduct. Petitioner cites no federal authority that would remedy that problem or turn permissible conduct under state law into a breach of any "federal common law rule."

Equally unavailing is the Tribe's contention that "federal common law establishes economic principles governing actual present value calculations." Petition at 28. Again, petitioner's claim that this matter presents questions of federal common law is not only new; it is contrary to the Tribe's position in the lower courts that Washington State

law is controlling. At no time did the Tribe argue to the District Court or the Court of Appeals that there is any federal common law that governs how settlements are to be valued for the purpose of calculating attorneys' fees. It is inappropriate that this argument is being made for the first time in a petition for a writ of certiorari.

Moreover, the Tribe fails to demonstrate the existence of any pertinent federal law. At issue here are (1) the enforcement of a contingent fee contract and (2) calculation of the present value of a settlement. The federal cases cited by petitioner have nothing whatever to do with either one of these questions. The case upon which the Tribe principally relies, Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 103 S. Ct. 2541, 76 L. Ed. 2d 768 (1983), deals exclusively with the calculation of damages under the federal Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. § 904, et seq. The case does not address, explicitly or implicitly, how attorneys' fees or the values of

settlements are to be calculated. Similarly, Monessen Southwest Ry. Co. v. Morgan, 486 U.S. 330, 108 S. Ct. 1837, 100 L. Ed. 2d 349 (1988), is limited to the issue of how damages are to be calculated under the Federal Employer Liability Act, 45 U.S.C. § 51, et seq. It is fanciful to contend, as does the Tribe, that these cases, interpreting and applying federal compensation statutes, create any common law rule governing the calculation of attorneys' fees under a contingent fee agreement. Certainly, nothing in these cases supports the Tribe's position that, in valuing a settlement, large cash payments to the claimant may be treated as having no value.

C. NO CONFLICT EXISTS BETWEEN THE COURT OF APPEALS DECISION AND THE DECISIONS OF OTHER FEDERAL COURTS

Petitioner does not contend that the decision of the Court of Appeals conflicts with any decision of the Supreme Court or any other federal court. In fact, petitioner fails to identify any other federal court decision addressing the

attorney-client and contract issues decided by the Ninth Circuit in this matter. Supreme Court review is not necessary either to resolve a conflict among the Circuits or to resolve any important question of federal law.

IV.

CONCLUSION

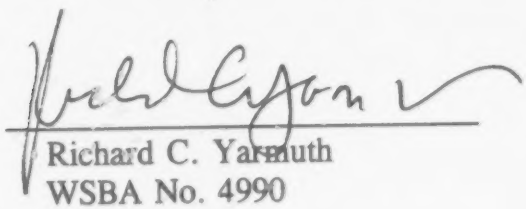
In the courts below, petitioner argued numerous state law claims purportedly justifying the Tribe's refusal to perform its obligations under the contingent fee contract. Those claims were rejected by both the District Court and the Court of Appeals because petitioner was unable to present any evidence supporting its allegations. In its Petition, the Tribe continues to advance unsubstantiated factual allegations, mischaracterizes the lower court decisions, and presents, for the first time, spurious questions of federal law. But the fact remains —— this case involves no issue of law

meriting review by the Supreme Court. The petition for a writ of certiorari should be denied.

DATED: June 15, 1994.

Respectfully submitted,

CULP, GUTERSON & GRADER

By: 

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No. 93-1941

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

NISQUALLY INDIAN TRIBE, PETITIONER

v.

CULLEN AND CULLEN, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. THIS COURT'S DECISION IN *O'MELVENY V. F.D.I.C* NECESSITATES REVIEW OF THE LOWER COURTS' FAILURE TO ADDRESS FEDERAL POLICIES IN LIGHT OF APPLICABLE STATE AND FEDERAL LAW

Subsequent to the Tribe's submission of its petition for writ of certiorari but prior to the firm's brief in opposition, this Court rendered its decision in *O'Melveny v. F.D.I.C*, (to be reported at: 114 S.Ct. 2048) No. 93-489, slip op. (June 13, 1994). *O'Melveny* bears directly on this case. The firm chose not to address *O'Melveny*, though the Tribe had briefed the Ninth Circuit decision in its petition. Tribe's Petition, p. 25.

O'Melveny was a state-law cause of action brought in federal district court under California's attorney malpractice law. Here we have an ancillary attorney lien proceeding in federal

district court initiated by the Cullen & Cullen law firm under state procedural statutes. Revised Code of Washington §§ 60.40.010-030, Tribe's Petition, 12-13. The lien proceeding is ancillary to a federal cause of action and involves the res of a trust created by settlement contracts between the Tribe and the cities. The trust funds are comprised of payments derived from utility rate payers, both for settlement of tribal damage claims brought under the Medicine Creek Treaty of 1854, 10 Stat. 1132, and fishery mitigation funding to satisfy the cities' hydroelectric licensing requirements under the Federal Power Act in on-going proceedings before the Federal Energy Regulatory Commission. 16 U.S.C. §§ 797(e) & 808. Thus, the federal rule of decision for valuing damages under federal statutes, as enunciated in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), is perfectly suited for this case. *See* Tribe's Petition, 29.[1]

O'Melveny reaffirmed that "'[t]here is no federal general common law,' *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)." Slip Op. at 3. A precondition to that rare situation where a federal rule of decision will be called upon to override state law is where there is a "'significant conflict between some federal policy or interest and the use of state law.' *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)." Slip op. at 5. "As matters stand, however, federal judges must do their best to estimate how the relevant state courts would perform their lawmaking task, and then emulate that sometimes purely hypothetical model." Slip. op. at 7 (Stevens, J.,

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[1] The firm continues to distance itself from *Jones*. Firm Opp., 18-19. This despite the fact that it was the firm's own economist, in his affidavit submitted with the firm's reply brief before the District Court, who claimed *Jones* served as authority for his method of economic analysis. CR 309, 3. The Tribe then argued the case at its first opportunity and even provided the District Court with a copy. CR 314, 6-7. The lower courts ignored *Jones*.

concurring, joined by Blackmun, J., O'Connor, J., and Souter, J.).

The Tribe does not seek a new federal rule of decision that will displace or alter state law, unless this Court finds the lower courts' interpretation of state law is correct. The Tribe asks this Court to review the grave injustice as a result of the lower courts' cursory treatment of the record and the law, both federal and state. What is needed here is guidance from the Supreme Court that if attorneys are to invoke the equitable power of federal courts against the interests of their clients they must be prepared to demonstrate that they satisfied their fiduciary duties of full disclosure. These are mixed-law questions. The fiduciary duties of full disclosure under state law may not frustrate the federal statutes involved, and the extent of the disclosure required will vary depending upon the nature of the structured settlement and the relative sophistication of the parties.

II. THE LOWER COURTS' MISAPPLICATION OF STATE LAW FRUSTRATES THE FEDERAL INTERESTS THAT WERE NOT CONSIDERED

The firm argues that "[n]o issue of great public importance is presented" here and that "[t]he lower court rulings rest almost entirely on the facts of this particular case rather than on any new or remarkable pronouncement of law." Firm Opp., 1. In fact, there are three distinct federal interests of great importance that the Tribe has advanced throughout these proceedings: (1) the calculation of attorney contingency fees based in part on public fishery mitigation funding required for FERC licensing under the Federal Power Act (16 U.S.C. §§ 797(e) and 808, Tribe's Petition, 3-5); (2) the fixing of attorney fees under federal statutes designed to protect Indian tribes (25 U.S.C. §§ 82 and 476, Tribe's Petition, 8-11), and (3) the use by attorneys of the equitable power of federal courts against the interests of a client.

The lower courts failed completely to address these federal interests. In addition, both courts reached the remarkable

conclusion that Washington law did not require the attorneys to advise their client, when fixing fees, that both the attorneys and the adverse parties had a self-interest to maximize the values of the structured settlements or that the client should have sought independent economic advice.

The firm claims the Tribe's assertion that the District Court held the attorneys had no duty of full disclosure in fixing their fees "mischaracterizes the lower court rulings" and that "the District Court made no such holding." Firm Opp., 10-11. However, the decision of the District Court, which the firm now describes as "thorough", disposed of the duty question in only two sentences. District Court Order, Tribe's Petition, 12a-13a. The Tribe had advanced below that the duty arose under federal statutes, the attorney contracts, bar rules and several Washington cases, including, for example, *Kane v. Klos*, 50 Wash.2d 778, 314 P.2d 672 (1957), which held the client "must be apprised of all material facts and as well of their legal effect" before a breach of the disclosure duty may be cured. CR 314, 11-12. Not only were most of those authorities ignored, but the three cases the court did cite were casually cast aside without any analysis.

A review of those Washington cases the District Court did cite reveals the plain error of the court's cursory rejection of the need for independent economic advice. In *Ravsten v. Department of Labor and Industries*, 108 Wash.2d 143, 736 P.2d 265 (1987), the Washington Supreme Court held that payment of contingency fees must be based on actual present value of the structured settlement. 736 P.2d at 274. In *Perez v. Pappas*, 98 Wash.2d 835, 659 P.2d 475 (1983), the same court held that present value must be calculated using discount rates "based on a variety of figures best understood by economists". 659 P.2d at 480; *cf.* Firm Opp., 11 n. 2.

In *Perez*, the attorney asked his brother, an economist, to calculate the present value of the structured settlement for the client. He based his fees on his brother's value calculation. The client consulted another economist who determined the value was inflated, whereupon the two economists met and mutually agreed upon a lower figure. The client was reimbursed and then

brought suit for return of amounts paid the attorney. The Washington Supreme Court properly held that there was an accord and satisfaction based upon the express agreement after "full revelation." 659 P.2d at 480.

Here the Tribe never had independent advice and upon its request that its attorneys explain how the values were determined, the firm refused and responded "do your own calculation". CR 284, Exh. 20, 230. Furthermore, under the Tacoma agreement, according to Kevin Lyon of the firm, Tacoma's engineers did the calculations with the lawyers' participation. CR 235, 9-10. So not only were the calculations performed by self-interested parties, Tacoma and the lawyers, but they were not even performed by economists as required by Washington law.

The Court of Appeals did not even address the duty question as to the value calculations when the firm exacted it fees. Tribe's Petition, 3a-4a. Instead, the court noted that an ethical rule (WRPC 1.5(c)) requires that attorneys explain the basis for fee calculations, and then the court suggested that the post hoc valuations of the firm's economist retained for the lien proceeding satisfied that ethical duty. Tribe's Petition, 3a-4a.

The Court of Appeals also held that "the Tribe has admitted that the figures were correct". *Id.*, 3a. But the concept of "admissions" is not found in the extensive body of Washington law dealing with fiduciary duties of attorneys to make full disclosures to their clients. *See* Tribe's Petition, 26-27. Rather, it is found in Washington's law of car repair as stated in the case found in footnote 1 of the appellate court's memorandum (Tribe's Petition, 3a-4a n. 1): *Northwest Motors, Ltd. v. James*, 118 Wash.2d 294, 822 P.2d 280, 286 (1992).

The *James* case dealt with an automotive repairman's defense of "account stated" when the customer later challenged a repair bill the customer had paid. But even the defense of "account stated"---an affirmative defense that the firm never raised---would not relieve the attorneys of their fiduciary duties of full disclosure:

> The Restatement of Contracts defines an "account stated" as "a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor." *It does not itself discharge any duty*, but is an admission by each party of the facts asserted and a promise by the debtor to pay according to its terms.

James, 822 P.2d at 284 (emphasis added).

The Court of Appeals overlooked the fact that not one of the 14 Tribal witnesses deposed by the firm in this proceeding testified that they understood the damage/mitigation distinction under the settlements. Also overlooked was that none of the four Business Committee members who were asked to pass the firm's Resolution 6-1990 were involved in the cities' present value calculations. They all were elected to office after settlement with Tacoma, and were led by the attorneys to believe the Tribe was obligated to use Tacoma's present value figures to set attorney fees. Tribe's Petition, 21-22.

The firm argues that the "District Court ruled against the Tribe, not on the basis of any holding that no duty existed, but instead because there was no evidence that the duty had been breached." Firm Opp., 11. In fact, the District Court found no duty, which is why it found no breach. The lower courts failed to recognize the coercive nature of the Tribe's passage of Resolution 6-1990, which the firm drafted. The Tribe had committed in the Tacoma agreement to carry on operations and maintenance of the federal hatchery with funds paid under section 3 of the agreement. Tribal law was drafted by the firm to prohibit the use of those funds to pay attorney fees, so only "unrestricted funds" secured under Section 2 of the agreement could be used for fees. Nisqually Ordinance No. 1989-1, Chapt. XI, Tribe's Petition, 14. Then the firm filed a lien in District Court claiming $1.78 million in fees from both damage funds and hatchery funds in the firm's possession. Those are the circumstances under which the Tribe approved the firm's resolution. Such conduct by attorneys has been condemned under Washington law as a form of "economic coercion." *Ross v. Scannel*, 97 Wash.2d 598, 606, 647 P.2d 1004, 1008 (1982).

The District Court relied exclusively on the deposition testimony of Dorian Sanchez, Tribal Chairman, for the proposition that the Tribe fully understood at the time of the Tacoma agreement, 1987, that the city's present value figures would serve as the basis upon which the attorneys would be paid their fees. Tribe's Petition, 13a. But it is undisputed that Dorian Sanchez was not on the Business Committee and was not even involved in the negotiations with Tacoma. He was therefore not a competent witness on the issue of what the Tribe understood at the time of the Tacoma Agreement, as reflected in his own testimony:

Question:	And as Tribal chairman, looking again at [Resolution No. 6-1990], you would agree that you would use, or the business committee should use that negotiated settlement figure to determine what the attorneys' fee would be?
Answer:	That's correct, that's what was in the settlement.
Question:	You mean that's what the Tribe's position with respect to the settlement was?
Answer:	Yeah, when they adopted the settlement.
Question:	When they adopted the settlement?
Answer:	Yeah, previous council prior to me.

CR 299, D. Sanchez Tr. 52. In fact, the record reveals that the Business Committee members present at that 1990 meeting were led by the firm to believe the Tribe was obligated to use Tacoma's $15.6 present value figure for purposes of fixing the fees. CR 289, ¶ 11, 4-5; CR 286, ¶ 4, 2-3; CR 288, ¶ 4, 2-3. That is why Resolution 6-1990 did not deviate from the $1.78 million claim the firm first made when it filed its lien in October of 1989.

In addition to the duty of full disclosure under state law, the attorneys here breached their duty under federal statutes to make concomitant disclosures to the Federal Government. Tribe's Petition, 8-11. When Kevin Lyon of the firm requested

retroactive federal approval of the firm's 45 percent fee increase, he did not explain to the Federal Government either what he would be claiming or how the fees were to be calculated. CR 284, Exh. 2, 25-29. A mere week later Lyon filed his first lien claiming $1.78 million in fees. CR 284, Exh. 4, 136.

III. THE FIRM SEEKS TO DIVERT THE COURT'S ATTENTION AWAY FROM THE DUAL PROCEEDINGS INVOLVING HYDROELECTRIC LICENSING BEFORE FERC

The lower courts and the firm ignored the significance of the FERC proceedings. Firm's Opp., 1. But it was because of those proceedings that the Federal Government made the attorneys revise their contingency fee contracts. Tribe Petition, 19-20. It was because of those proceedings that the attorneys demanded a 45 percent fee increase two years into their 10-year contract of 1979. *Id.*, 20. It was the FERC statutes that created the duty for the city hydroelectric operators to provide for fishery mitigation, enhancement and protection. 16 U.S.C. §§ 797(e) & 808(a), *id.*, 3-5. The fisheries measures contained within these complex settlement contracts are designed to address the cities' mitigation duties, and it is the on-going FERC proceedings that will give those measures life.

The firm claims without detail that the Tribe's agreement with Tacoma contained nothing but benefits to the Tribe, including "large cash payments." Firm's Opp., 3. The firm's economist rested his entire theory on that false assumption when he performed his post hoc calculations. CR 236, ¶ 5, 2-3; *cf.* CR 303, ¶¶ 15-21, 9-12. The lower courts succumbed to that illusion of simplicity. Court of Appeals Memorandum and District Court Order, Tribe's Petition, 3a-4a, & 12a-14a. But the firm's simplistic characterization of these complex agreements fails to address, in addition to the damage recoveries, the concomitant obligations the Tribe assumed under both agreements to carry out FERC-related mitigation measures on behalf of the cities. The agreements require closer scrutiny.

Under Section 3 of the Tacoma agreement, for example, the Tribe was to be paid five annual installments of $250,000 for Tribal expenditures on "fishery related projects." CR 284, Exh. 2, 86-87. Despite the limitation as to Tribal use for these funds, Dr. Charles Pace, the Tribe's independent economist hired after the firm's refusal to account, assigned these payments a dollar-for-dollar recovery value, reduced to actual present value based on a discount rate. CR 284, Exh. 1, 10-11. The firm's economist agreed Dr. Pace's discount rates were proper. CR 309, ¶ 2, 2. The undisputed value assigned to these damage payments was thus $1,178,921. CR 284, Exh. 1, 11. But Dr. Pace also considered the mitigation funding under Section 2 of the Tacoma contract, described *infra*, and determined total Tribal recovery to be $2,457,750 under that agreement. *Id.*, 8. It was out of that structured recovery that the attorneys claimed their first $1.78 million in fees in October of 1989, $715,000 of which, plus costs, already has been paid and is not disputed. CR 213.

Under Section 2 of the agreement Tacoma is to fund, contingent upon reissuance of its FERC license, the operations and maintenance costs of the federal fish hatchery at Clear Creek, a tributary to the Nisqually River, on lands secured by the Tribe. CR 284, Exh. 2, 81-85; CR 306, 3-4. The hatchery funding is to satisfy in part Tacoma's obligation under the Federal Power Act to provide for the "protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat)". 16 U.S.C. §§ 797(e) & 808, Tribe's Petition, 4-5. Tacoma and the Tribe agreed that the "reasonable annual cost of [operations and maintenance] for the Clear Creek project equals the base amount of $435,000 (1988 dollars)." *Id.*, 81.

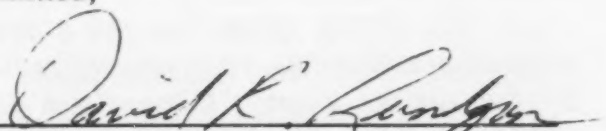
Dr. Pace's exhaustive and generous calculations, with supporting authorities, were summarily dismissed in one sentence by the district court: "[T]he Court is unpersuaded by the affidavits of Dr. Charles Pace who estimated the value of the settlements to be about one-fifth of the value originally assessed by the Tribe and the cites." District Court Order, Tribe's Petition, 13a. The Court of Appeals made no mention of Dr.

Pace's analysis, but summarily concluded in one sentence that the post hoc valuations of the firm's economist were correct. Court of Appeals Memorandum, Tribe's Petition, 4a. The Court of Appeals focused only on cash payments by relying on the concept of "gross recovery" under a state case, *Luna v. Gillingham*, 57 Wash. App. 574, 789 P.2d 801, *rev. denied*, 115 Wash.2d 1020, 802 P.2d 125 (1990). Court of Appeals Memorandum, Tribe's Petition, 2a. But such reliance was misplaced.

First, the gross-recovery concept of *Luna* deals with whether litigation costs are deducted prior to assigning a present value to the recovery for purposes of fixing attorney contingency fees. That concept has nothing to do with determining what was recovered. In fact, the Federal Government also specifically required the attorneys to amend their contracts with the Tribe so that costs would be deducted and paid before the net recovery is valued. CR 284, Exh. 45, 323-24 & ¶ VIII, 336.

Secondly, reliance on the gross-recovery concept was misplaced because it fails to account for the FERC-related mitigation measures and the well-settled economic principal that "costs must be considered" in calculating actual present value of recovery. *Jones*, 462 U.S. at 534; *see Ravsten*, 736 P.2d at 274 (1987)(holding that "marketplace cost" must be considered in determining actual present value of structured settlements). The parties to these settlement agreements expressly agreed that the mitigation funding was to cover reasonable costs incurred by the Tribe to carry out the cities obligations. CR 284, Exh. 2, 81-82 (Tacoma agreement); CR 284, Exh. 15, 208-209 (Centralia agreement).

Respectfully submitted,



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July 1994